create privity to support an action for money had and received by the second defendants.

It is the contention of the second defendants that in this case, they received the payment of the cheque for the benefit of the deceased and the first defendant (who is the third party) jointly. The money so received could only be applied to the joint account, which is the purpose for which the deceased paid the bank in the first place and not for any other purpose. If the bank had continued to hold the money so paid over in the sole account of the deceased instead of as directed, then it would clearly be held liable for money had and received to the first defendant who, upon the death of the deceased became the sole legal owner of the sum in question by reason of the rule of survivorship.

To sum up, I would say that in the present case, there is not the slightest doubt in my mind that the deceased had the necessary intention from the very beginning, concerned with the welfare and interest of his wife in the event of his death, to make provision for her while he was still alive. Why he decided to authorise the opening of the joint account with Chow Yee Wah and the transfer of the money into the joint account with a view that the money would be utilised for his wife's benefit in the event of his death is something that only the deceased himself could say. I can only assume in view of the illness he might not live long. He had probably thought that the chances of his surviving his illness were quite slim.

It is true that the gift was contingent in the sense that she would only be entitled to benefit on the deceased's death, and, that if the deceased should recover from his illness, the money would still be his. Nevertheless, I am fully satisfied that in law, Chow Yee Wah, having been specifically directed to apply the money solely for Chan Yoke Ying's use, was a lawfully constituted trustee to hold the money in trust for the benefit of Chan Yoke Ying.

May I now refer to a case cited by Mr. Chan Siew Yoon — *Russel* v. *Scott, supra* — where at page 454 Dickson and Evatt J.J. said —

"For it is said that the deceased's intention that her nephew on surviving her should take the amount of the bank account is a testamentary wish to which effect could be given only by a duly executed will. This must mean that, while retaining full beneficial property in a corpus, she intended that on her death some other person should succeed to her property in that corpus or to some interest therein to which he was not before entitled either absolutely or contingently, and to which the law gave him no title to succeed. It is only in this sense that an intention to benefit can be said to be testamentary. Law and equity supply many means by which the enjoyment of the property may be made to pass on death. Succession post-mortem is not the same as testamentary succession. But what can be accomplished only by a will is the voluntary transmission on death of an interest which up to the moment of death belongs absolutely and indefeasibly to the deceased. This was not true of the chose in action created by opening and maintaining the joint bank account."

Before I conclude may I say that I am entirely in agreement with Mr. Chan Siew Yoon's submission that there is in the instant case a completely constituted trust. The law dealing with the constitution of voluntary trusts is to be found in the most celebrated case of *Milroy* v. *Lord*[7] where Turner L.J. at page 1189 said —

"... I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift."

I am further in agreement with Mr. Chan Siew Yoon's submission that the fact the deceased might revoke the trust in the event of his recovering from his illness would not make any difference as it would seem clear from the following passage in the judgment of Starke J. in *Russel* v. *Scott, supra* —

"Thus a voluntary settlement vesting property in trustees for the benefit of the donor for his life, and after his decease for the benefit of other persons, with a power of revocation, is not testamentary: it takes effect immediately upon its execution, and is not postponed until after the donor's death."

In conclusion, I would say that it is my considered judgment that for reasons that I have stated, having regard to the whole of the evidence adduced before this court, I find no merit in the plaintiff's claim. I would therefore dismiss the plaintiff's claim against both defendants with costs.

Claim dismissed.

Solicitors: *Joginder Singh & Co.; Shearn Delamore & Co.; Shook Lin & Bok.*

LOW AI BEE v. RALPH EU PENG LEE

[O.C.J. (Abdul Hamid J.) November 30, 1973]

[Kuala Lumpur — Civil Suit No. 746 of 1971]

Family Law — Separation agreement — Provision for payment of maintenance — Whether agreement enforceable — Polygamous marriage.

In this case the plaintiff claimed sums due to her under a separation agreement entered into between her and her husband, the defendant. It was contended by the defendant that the agreement was not enforceable as the marriage which was according to Chinese rites and customs was a potentially polygamous one.

Held: the court had jurisdiction to enforce the agreement as although the marriage was potentially polygamous it was recognisable in law as a valid marriage.

Case referred to:-

(1) *Shahinaz* v. *Rizwan* [1964] 2 All E.R. 993.

CIVIL SUIT.

Chin for the plaintiff.

D'Cruz for the defendent.

Abdul Hamid J.: The plaintiff is claiming certain sums of money which the defendant agreed to pay under an agreement entered into between her and the defendant some time in January, 1971.

Briefly the facts are as follows — The plaintiff was married to the defendant according to Chinese rites

and customs in 1968. There is a child of the marriage Her name is Joanna Eu Gaik Ping. Unhappy differences arose as a result of which the marriage was dissolved on January 11, 1971. An agreement (P1) was drawn on that date providing, amongst other things —

(i) that the wife shall be entitled to the sole custody, control, maintenance and guardianship of the said child and that the husband shall not in any way interfere in the management, education or upbringing of the said child; and

(ii) that the husband shall pay to the wife for her separate use and the maintenance and support of herself and the said child a sum of $600 per month for the months of January, February, March, April, May and June, 1971 and a sum of $500 per month thereafter until the wife remarries. The first of such payments shall be made on execution of this agreement and subsequent payments shall be made in advance on the first day of each and every month.

The plaintiff covenanted *inter alia* that she would not at any future time directly or indirectly molest annoy disturb or interfere with the husband in his person business or manner of life.

The sums agreed upon were not paid by the defendant except the sums due on the first two months which were recovered after the plaintiff obtained judgment against him in the lower court.

The plaintiff is now claiming all the sums due to her and the child under the agreement.

The defendant contends that the said agreement is not enforceable against him. It is said that since the marriage was a polygamous or a potentially polygamous marriage, the Court in Malaya has no jurisdiction over the plaintiff's claim as the agreement is based on the consideration of the dissolution of a polygamous marriage, and that alternatively, as relief sought by the plaintiff is a claim for matrimonial relief, such relief is against public policy.

Mr. D'Cruz counsel for the defendant in his submission drew my attention to section 4 of the Divorce Ordinance, 1952 and argued that the court is only given the power to adjudicate under that section of the Ordinance.

Mr. Chin counsel for the plaintiff pointed out that the claim does not relate to any of the reliefs referred to in section 4 of the Divorce Ordinance, 1952.

I am of the view that there is no merit in the defendant's argument and I am inclined to agree with the submission made by Mr. Chin. It seems clear in the light of the judgment in *Shahinaz* v. *Rizwan.*[1] The marriage is recognizable in law as a valid marriage. Here, the court is not called upon to adjudicate as to the dissolution of the marriage or on any matters relating to matrimonial relief but to determine purely on the question of the payment of the maintenance which the defendant voluntarily agreed to pay to the plaintiff and the child of the marriage. This court, in my view, has jurisdiction to enforce the agreement. It should be observed that the defendant had not only agreed to pay maintenance to the plaintiff but also to the child of the marriage. Clearly, under the Married Women and Children (Maintenance) Ordinance, 1950, the plaintiff could, if the defendant had not agreed to pay maintenance, apply to the appropriate court and that court would have jurisdiction to make an order requiring the defendant to make monthly allowance for the maintenance of the child.

In *Shahinaz* v. *Rizwan,*[1] the court clearly held that although the marriage of the parties was potentially polygamous, such a marriage was recognizable by the court as a lawful marriage, and, as a matter of policy, the fact that the contract for dower was entered into in contemplation of such marriage should not debar the court from enforcing the wife's right to dower which was a right *ex contractu*, not derived from marriage, so that the claim to enforce it was not a claim for matrimonial relief — accordingly the court had jurisdiction which it was prepared to exercise to enforce the claim for dower.

It should also be borne in mind that the defendant, having freely agreed to pay maintenance to the wife and the child of the marriage, should not be allowed to reject the validity of his own agreement. In any event, the defendant cannot deny that he is under a legal obligation to maintain the child of the marriage. The defendant told this court of certain incidents to support his allegation that the plaintiff had embarrassed him. He said that she interfered with his association and society with one Lau Chooi Key. Suffice if I say that the defendant is making a mountain out of a molehill. This incident happened in March, 1971 barely two months after they were separated. At that time both the defendant and the plaintiff were still staying together in the same house. This isolated incident and mere embarrassment is, I think, insufficient to constitute a breach of the clause referred to by the defendant. In any event, defendant had not made any attempt to terminate the agreement. In my view, the defendant is raising this defence with a hope that he might on this technical defence avoid payment. As for the other incidents which the defendant referred to in his testimony, they are, I think, so petty that I do not consider them sufficient to constitute a breach of the agreement.

It is my considered judgment that the plaintiff's claim should succeed. I therefore enter judgment for the plaintiff in the sum of $3,900 and from October 1971 to March 31, 1973 $500 per month amounting in all $9,000 — totalling $12,900 with interest at 6% per annum to date of realisation and costs.

Claim allowed.